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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/607,837	06/27/2003	Thomas M. Hayes	14416	8461
25763 7590 05/15/2007 DORSEY & WHITNEY LLP INTELLECTUAL PROPERTY DEPARTMENT SUITE 1500 50 SOUTH SIXTH STREET MINNEAPOLIS, MN 55402-1498			EXAMINER SAYALA, CHHAYA D	
			ART UNIT 1761	PAPER NUMBER
			MAIL DATE 05/15/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/607,837

Applicant(s)

HAYES ET AL.

Examiner

C. SAYALA

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 April 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-22 is/are rejected.
- 7) ☒ Claim(s) 23 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 4/16/2007 has been entered.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

1. Claims 21-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 21 recites a weight percentage of hydrogenated poultry fat "which varies". This claim does not set out the metes and bounds. What does "varies" mean? Since no amounts are set by this claim, it even appears that this claim does not further limit claim 1.

Claim 22 states that the weight percent decreases. This begs the question "decreases from what?". Does it decrease from the upper limit or the lower one?

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 1-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Livingston (US Patent 6033176) and Johnston (US Patent 5498434) in view of admitted prior art in the specification at page 1, paragraph [002] and Cook (US Patent 5851572) and further in view of Evans et al. (US Patent 5427802) and Schaub (US Patent 5215766) taken with Swine Diet Recommendations (1994, downloaded from <http://www.aces.edu/pubs/docs/A/ANR-0639>) and Practical Swine Feeding Ideas (1995, downloaded from [http:// www.animalgenome.org/edu/PIH/prod\\_growing.html](http://www.animalgenome.org/edu/PIH/prod_growing.html) ).

Livingston teaches animal feeds that contain poultry fat (see abstract). Johnston also teaches fat containing animal feeds and teaches use of poultry fat (see col. 2, line 51). Both references do not teach hydrogenating fats. Schaub teaches hydrogenating fats. Schaub teaches that high fat feeds or rations, used in animal feeds, provide energy needs of animals, and includes fats such as lard, tallow etc. The patentee teaches that when non-hydrogenated fats of high natural melting point are used, they

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are not hydrogenated. However, if the fats are of a low melting point variety, they are hydrogenated (i.e. have melting point lower than the body temperature of the animal being fed). Using such hydrogenated fat is said to improve the quantity and quality of the feed (see col. 5, lines 4-19).

It is known in prior art that the firmness of pork belly is obtained by providing saturated fats in the diet of a pig (see page 1 of specification that discusses what is known in prior art). See also col.1, lines 34-35 in Cook. In fact, Evans et al. teach that to improve carcass firmness and quality, feeding highly saturated fats to animals is beneficial. The patentees teach that the highly saturated fats should have an iodine value in the range 5-35. Finishing pigs fed saturated fats in feed ration even for the last 3 weeks of the cycle resulted in acceptable levels of carcass firmness. The weight claimed in claim 4 obviously addresses that of a finishing pig, and this would have been obvious to one skilled in the art who would have known that finishing pigs weigh from 125 pound upwards or thereabouts.

Based on the combination of the above references, it would have been obvious to hydrogenate even poultry fat, before feeding it to finishing swine since the primary references teach using poultry fat in animal feed and Evans et al in particular teach that finishing pigs benefited in carcass quality and firmness by being fed hydrogenated fats. As for the claimed iodine value, Evans et al teach that too, and to optimize such values would be within the realm of the artisan, since it is known that the iodine value is a means to measure the degree of saturation required and that the lower iodine value, the higher the hydrogenation. Furthermore, to mix in tallow, a known saturated fat and

already used in animal feeds (Schaub), that contain grain (see Schaub, col. 4), would have been obvious to one of ordinary skill in the art, because to combine 2 ingredients known for their use for the same purpose is prima facie obvious. Claim 1 limitations/steps of slaughtering, injecting the pork belly, pressing the pork belly and slicing are all typical steps known in the art, as discussed on page 1 of the specification, which admits that these are typical process steps (see line 9). As for the amounts of fat in the feed, both the bulletin references report that the fat content of a typical feed is in the range 3-5% (page 2 of the 1994 reference) and the maximum level of fat in a swine diet is 8 (finisher diet), see page 15 of the 1995 reference. It would have been obvious to consider these amounts and optimize it, whether the fat is hydrogenated or not, since fat requirements would be the same.

### ***Allowable Subject Matter***

3. Claim 23 is objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

### ***Response to Arguments***

Applicant's arguments filed 4/16/2007 have been fully considered but they are not persuasive.

Livingston has been criticized by applicant for 1) teaching the use of fat along with house litter, etc. and 2) for not teaching hydrogenated fat, or any of the other limitations. Livingston has been applied here as a reference that teaches using poultry fat in animal feed. Similarly, Johnston also teaches using poultry fat in animal feed. Applicant has criticized this reference also in the same way and goes further to state that Johnston teaches fat in animal feed, and more particularly in pet food. The "non-preferred" as well as the "preferred" portion of a reference is pertinent for what it teaches to one skilled in the art. *In re Meinhardt*, 157 USPQ 270 (CCPA 1968). Furthermore, the litter, etc. is not excluded by these claims. There is also no requirement under 35 USC 103 that a single reference must show *all* the limitations. Therefore, even if applicant states that this reference is limited in its teachings, the fact remains that Johnston teaches using poultry fat in animal feed.

The other limitations are taught by admitted prior art in the specification, by Cook and certainly by Evans, all taken together. Cook, applicant has stated, is drawn to feeding CLA and because CLA is an unsaturated fat, applicant states that this reference is inapplicable. Cook has been used for its prior art disclosure that saturated fat produces firm fat when fed to animals. This is relevant. Even though Cook teaches using CLA, that does not take away from the fact that the use of saturated fat was old and known in the art. In fact, Evans teaches feeding hydrogenated fats to finishing pigs stating that this is highly beneficial. As for the limitation of amounts of fat, prior art already prescribes this amount for finishing pigs. Applicant's extensive discussion of Evans with respect to the iodine value also has been carefully considered in view of

distinguishing the instant invention for patentability purposes, but the range of Evans overlaps with the claimed range. Therefore, it must be said while applicant has clearly addressed each and every reference for its lack of certain limitations claimed herein, applicant has improperly criticized the references individually where the rejection is based upon the combined teachings of the references. *In re Merck., Inc.*, 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). Unobviousness cannot be established by attacking references taken individually when rejection is based on a combination of references. *Ex parte Campbell* 172 USPQ 91 (BPA&I 1971). Test for combining references is not what individual references themselves suggest but what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. *In re McLaughlin*, 170 USPQ 209 (CCPA 1970).

With regard to Schaub and Evans et al., applicant states that Schaub specifically teaches a feed having fat in excess of "about 5%" and therefore, Schaub can be interpreted "as teaching against a daily feed ration comprising "about 0.5 to less than about 5 percent by weight hydrogenated poultry fat," as recited by each of the independent claims." The now claimed "about 5 percent" reads on 5.2%, for example, and the language "about 0.5 to less than about 5 percent by weight", still reads on the art applied. Even if applicant claimed a range of about "0.5 to less than 5% by weight", which claim would now include amounts such as 4.99%, it is not clear how this is unobvious over prior art. See *In re Nolan*, 193 USPQ 641, wherein it was established that the advantage relied upon must be a significant advantage. This same argument



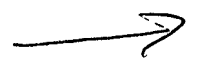
holds good for the iodine value now claimed. "Greater than about 35" (i.e. 35.1) is not so different from 35 of prior art and it is not clear how this distinguishes the claimed range from the prior art range.

Applicant's discussion of the Bulletin references at page 9 of the remarks, clearly suggests that applicant assumes the rejection under 35 USC 103, requires that every reference applied in combination should show each and every limitation, which is an erroneous standard.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to C. Sayala whose telephone number is (571) 272-1405. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

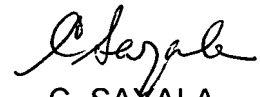
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A handwritten signature in black ink, appearing to read 'C. Sayala', written in a cursive style.

C. SAYALA  
Primary Examiner  
Group 1700.